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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1491

JAMES R. HOFFA, THOMAS EWING PARKS, EWING KING and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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INDEX

Page

Prayer 1

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutes and constitutional provisions involved 3

Statement 4

Introduction 4

Eavesdrop hearing 7

A. Prehearing proceedings 7

B. Evidence relating to Partin-King conversation adduced at eavesdrop hearing 9

C. Trial Court's findings 13

D. Opinion of Court of Appeals 14

Reasons for granting the writ 15

1. Violation of Fifth and Sixth Amendments 15

2. Violation of Fourth Amendment 18

3. Government's suppression at trial of King-Partin transcript violated petitioners' right of due process and 18 U.S.C., Section 3500 21

Conclusion 24

Appendix A—Majority and dissenting opinions of the Sixth Circuit Court of Appeals A-1

Appendix B—Opinion of the District Court A-18

Appendix C—Judgments of the Court of Appeals ...A-42

Cases Cited

Brady v. Maryland, 373 U.S. 83 .....15, 23
Bumper v. North Carolina, 391 U.S. 543 20

Caldwell v. United States, D.C. Cir., 205 F. 2d 879 ... 17
Chapman v. California, 386 U.S. 18 18
Chimel v. California, 395 U.S. 752 19
Coplon v. United States, D.C. Cir., 191 F. 2d 749 17

Evans v. United States, 6 Cir., 284 F. 2d 393 18

Giles v. Maryland, 386 U.S. 66 .....15, 23

Harris v. New York, ... U. S. ..., No. 206, October Term, 1970 23
Hoffa v. United States, 385 U.S. 293 .....2, 15, 16

Judd v. United States, D.C. Cir., 190 F. 2d 649 20

Kinser v. Cooper, 6 Cir., 413 F. 2d 730 (1969) 20
Kovach v. United States, 6 Cir., 53 F. 2d 639 20

Massiah v. United States, 377 U.S. 201 .....2, 14, 15, 16, 17

Napue v. Illinois, 360 U.S. 264 (1959) 15

Osborn v. United States, 385 U.S. 323 19

Palermo v. United States, 360 U.S. 343 (1959) 22
People v. Stendig, 6 N.Y.S.2d 214 17
People v. Wallace, 234 N.Y.S.2d 579 17

Rosenberg v. United States, 360 U.S. 367 22

Shields v. United States, 273 U.S. 583 18
Silverman v. United States, 365 U.S. 505 20
Simmons v. Bomar, 6 Cir., 349 F. 2d 365 20

Spano v. New York, 360 U.S. 315 .....16, 17

United States v. Hoffa, et al., 6 Cir. 349 F. 2d 20, 385 U.S. 293 (1966) 5

United States v. Jeffers, 342 U.S. 48 19

United States v. Luxenberg, 6 Cir., 574 F. 2d 241 17

United States v. Rivera, 2 Cir., 321 F. 2d 704 19

United States v. Schor, 2 Cir., 418 F. 2d 26 18

United States v. Soffer, 7 Cir., 362 F. 2d 523 .....22, 23

United States v. Stanley, 6 Cir., 245 F. 2d 427 17

United States v. White, 7 Cir., 405 F. 2d 838, cert. gr. 394 U.S. 957 .....18, 19

Wong Sun v. United States, 371 U.S. 471 19

Wren v. United States, 10 Cir., 352 F. 2d 617 20

Statutes and Rules Cited

Constitution of the United States:

Fourth Amendment 2, 3, 7

Fifth Amendment 2, 3, 14, 15

Sixth Amendment 2, 4, 15

Federal Rules of Criminal Procedure, Rule 16 7

18 U.S.C., § 2 3

18 U.S.C., § 3500 .....3, 4, 15, 21, 22, 23

18 U.S.C., § 4208(a)(2) 6

28 U.S.C., § 1254(1) 2

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To the United States Court of Appeals for the Sixth Circuit

Petitioners pray that a Writ of Certiorari be issued to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in this cause on January 21, 1971.

OPINIONS BELOW

The majority and dissenting opinions of the Sixth Circuit Court of Appeals are not yet reported and are printed as Appendix A, *infra*. The opinion of the District Court is printed as Appendix B, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on January 21, 1971 (Appendix C, *infra*). On February 16, 1971, Mr. Justice Stewart extended the time for filing the petition for writ of certiorari to March 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Were petitioners' Fourth, Fifth and Sixth Amendment rights violated when the government caused one of them, without prior judicial authority, to be surreptitiously interrogated by an informer in an automobile in which an electronic recording device had been placed; after such petitioner had been accused of the crime, had invoked the Fifth Amendment on several occasions, had obtained counsel, and the case had been fully presented to the grand jury which was to return an indictment against petitioners on the day following—thus placing him at the time of the interrogation in the position of a virtual defendant?

2. Whether this Court's holding in **Hoffa v. United States**, 385 U.S. 293, overrules **Massiah v. United States**, 377 U.S. 201, to such an extent that a defendant's Sixth Amendment right to be free of governmental interrogation in the absence of his counsel is not violated unless he has been formally indicted by a grand jury.

3. Where the conviction of one charged as a principal must be reversed, must the conviction of one charged as an aider and abettor of and jointly tried with such principal similarly be reversed?

4. Does a recorded statement, prepared by the government, of its secret informer and chief trial witness' interrogation of a defendant constitute a "statement" pro-

ducible under § 3500, Title 18, U.S.C., and may the government, without violating an accused's right to due process of law, intentionally and unilaterally withhold such a statement from the trial Court and from the defense?

5. Whether by reason of the government's intentional suppression of evidence vitally material to the constitutional validity of petitioners' convictions, this Court should in the exercise of its supervisory powers, as a deterrent to similar affronts to proper law enforcement, and to maintain the integrity and fairness of due administration of law, set aside the judgments of conviction heretofore rendered in this case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2, Title 18 U.S.C., provides in pertinent part:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principle."

United States Constitution, Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V provides in part:

> "* * * nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *"

United States Constitution, Amendment VI provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Section 3500, Title 18, U.S.C., provides in pertinent part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined), of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * * * *
>
> (e) The term 'statement' * * * means--(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT

Introduction

Petitioners were convicted in March 1964 on an indictment charging them with violating the Federal Obstruction of Justice Act by wilfully endeavoring to influ-

ence petit jurors in the discharge of their duties in a prior case involving petitioner Hoffa (sometimes referred to as the "Test Fleet" case). So far as relevant here, Hoffa and King were convicted on count 5, which charged that Hoffa aided in petitioner King's efforts in influencing a juror by the name of Mrs. Paschal. All convictions were affirmed by the Sixth Circuit Court of Appeals and by this Court. **United States v. Hoffa, et al.**, 6 Cir., 349 F. 2d 20; 385 U.S. 293 (1966). Petitioners were committed to the custody of the Attorney General and commenced serving their sentences on March 7, 1967. Petitioner Hoffa is presently incarcerated under said sentence and the remaining petitioners have completed their terms of imprisonment.

The evidence presented on count 5 may be summarized as follows:

Mrs. Paschal was a petit juror in the case involving Hoffa, i. e., the "Test Fleet" case. Oscar Pitts, a member of a Teamster Local in Nashville, of which petitioner King was President, testified that he spoke with King on October 27, 1962 (during the Test Fleet trial), regarding a possible promotion for Mrs. Paschal's husband, a Tennessee State Patrolman. By this time, however, agents of the F.B.I. were conducting a surveillance of King and saw him go to Pitts' house. On November 17, Pitts, State Patrolman Paschal and King met on the "River Road" and (according to Patrolman Paschal), King asked him whether he would talk to his wife. Although Paschal finally said that he would, he never did speak to his wife. Other than evidence corroborating the fact that the "River Road" meeting did take place (never denied by King), the only other evidence was testimony by secret informer Edward Grady Partin of inculpatory statements attributed to King and Hoffa. King categorically denied at trial all the statements attributed by Partin to him and denied that he asked or intended that Paschal speak to his wife.

On December 6, 1962, and during the trial of the "Test Fleet" case, Judge Miller, presiding at the trial, held a closed hearing, following which he removed Mrs. Paschal from the jury in that case. Paschal and King were called into the hearing. King invoked his Fifth Amendment rights at said hearing. King also invoked his Fifth Amendment rights when subpoenaed to testify before the grand jury. The government knew that King was represented by counsel at that time.

In October 1968, some nineteen months after the commencement of petitioners' incarceration, the government, in response to Hoffa, Parks and Campbell's petition for a writ of certiorari to review the Sixth Circuit's affirmance of the denial by the District Court of their post-conviction motion for new trial, revealed to this Court that it had in its possession records of an undisclosed number of conversations, participated in by two of the petitioners, which were monitored by the government during the course of electronic surveillances.[1] The government did not disclose to this Court the number of such electronically monitored conversations, the date and places where such conversations occurred, the participants therein, or the content of such conversations. The government also represented that none of the three petitioners was ever the subject of electronic surveillance directed against him.

On March 24, 1969, this Court granted said petition for writ of certiorari and remanded the case to the District Court for a hearing to determine whether the convictions were tainted by the government's electronic surveillance.

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[1] It should be noted that the petitioner King did not file a Notice of Appeal from the District Court's Order in 1967 denying defendants' motion for new trial, but instead filed a motion for reduction of sentence in May, 1967. On June 7, 1967, the District Court reduced petitioner King's sentence by ordering that he be eligible for parole at such time as the Board of Parole might determine, pursuant to Title 18, U.S.C., Section 4208 (a) (2). Petitioners Hoffa, Parks and Campbell also filed motions for reduction of sentences, but said motions were denied by the District Court.

EAVESDROP HEARING

A. Pre-Hearing Proceedings

After the remand ordered by the Supreme Court, the District Court held a pre-hearing proceeding for the purpose of determining the procedure to be followed in the eavesdrop hearing.

During said pre-hearing proceedings, government counsel advised the Court that they had no information of any type of electronic overhearing that was illegal under the Fourth Amendment involving Parks or King (A. 141; Tr. 30-31).[2] In response, the Court held that it was up to the Court to determine whether a surveillance was a violation of the Fourth Amendment and that this would be done after a proper presentation of the facts. Government counsel remained silent, thus not revealing that a conversation between King and secret government informant Partin had been electronically overheard, recorded and transcribed one day prior to the return of the indictment.

Several days later, the government represented that the defendants overheard through electronic eavesdropping were Hoffa and Campbell (A. 24-28). Such government disclosure was made in writing and stated that the conversations were eavesdropped upon through the use of microphone installations (bugs) in Las Vegas, Nevada, and by radio equipment in Detroit, Michigan.

Subsequently, Hoffa and Campbell moved for production under Rule 16, F.R.Cr.P., of all reels of conversations electronically overheard by the government of **any of the defendants and witnesses**, including but not limited to

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[2] "A" references are to the printed appendix filed in the Court of Appeals and subsequently in this Court. "Tr." references are to pages in the transcript of the proceedings at the eavesdrop hearing.

the conversations identified in government's previous disclosure. Petitioner Parks joined in this motion (A. 34-36). The government filed a written response stating *inter alia* that "no conversations of the defendant Parks have been overheard by electronic surveillance. . . ." (A. 36-37).

Subsequently, defense counsel for King filed a motion for an order allowing him to adopt all motions previously filed by Hoffa and Campbell (A. 47). The government filed a response objecting to King's motion, and asserted that King made no showing that he had been overheard or that he had standing (A. 48). Accordingly, the District Court found:

> "The Court indeed agrees that all overheard conversations of the defendants and all conversations surveilled on their premises must be revealed to the defendants. The government has disclosed certain conversations and stated that **there are none with respect to defendants King or Parks.**" (Emphasis added. A. 54-55).

The Court then held that King and Parks would be allowed to adopt all motions of Hoffa and Campbell in regard to discovery, but because of the government's representations that there were no overhearings of King and Parks, the King and Park motions were denied.

Another conference among the Court, defense counsel and government counsel was held prior to the hearing. The Court, noting that the government had represented to the Supreme Court that the Las Vegas and Detroit bugs were the only overhearings (A. 159), instructed the government to make full disclosure of all overhearings so that additional hearings in the future would not be necessary (A. 157, 161; Tr. 25, 32). In so doing the Court also noted that the government had made representations to him at trial that there were no overhearings (A. 160; Tr. 28).

B. Evidence Relating to Partin-King Conversation Adduced at Eavesdrop Hearing

Walter Sheridan, Special Assistant to the then Attorney General, Robert Kennedy, was called as a government witness at the eavesdrop hearing and testified that although he was not an attorney, he was in charge of the overall investigation concerning the instant case (A. 172; Tr. 8). Sheridan testified on direct examination that he had never requested any federal agency to conduct any illegal eavesdropping on any defendant in this case, and that he had never asked **"any federal employee to eavesdrop on any defendant in this case"** (A. 172; Tr. 8).

On cross-examination, Sheridan at first refused to admit that there was any eavesdropping:

> "Q. How did you know that it was not illegal?
> A. That **what** was not?
> Q. Did you take it up with somebody?
> A. That **what** was not illegal?
> Q. Any of the eavesdropping that was done?
> A. **I'm not saying there was any done, Mr. Shenker.**" (Emphasis added. A. 181; Tr. 22-23.)

On further cross-examination, Sheridan finally confessed that F.B.I. agents had placed a recording device and hidden microphones in Partin's automobile and that a conversation between King and Partin was electronically overheard, recorded and transcribed shortly before the return of the instant indictment[3] (A. 182-183; Tr. 24-26). Sheridan testified that the overheard conversation took about 20 to 30 minutes (A. 223; Tr. 89), that he read the transcript of the recorded conversation within 48 to

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[3] Although government witnesses testified that the Partin-King overhearing took place ten days to two weeks prior to the return of the indictment, the trial court's *in camera* examination of government files revealed that it took place on May 8, 1963, on day prior to the return of the indictment.

72 hours after it took place and that he conferred with government trial prosecutor James F. Neal concerning the transcribed conversation (A. 184, 1954; Tr. 27-29). Sheridan also admitted that he discussed the conversation in detail with Partin sometime after the time of the conversation (A. 186; Tr. 31), however, the defense was not permitted to ask Sheridan if he was satisfied with the information (Tr. 88; A. 222).

The transcript of the recorded conversation was placed in the Department of Justice's file on the Hoffa investigation and was kept under Sheridan's control with everything in it being available to government prosecutor Neal (A. 223; Tr. 89-90). **Sheridan admitted that the transcript of the eavesdrop conversation had not been turned over to the trial court at the original trial** (A. 185; Tr. 30). A copy of the transcript of this conversation was made a part of the Sixth Circuit's majority opinion (App. A., *infra*, pp. 8-16).

Herbert J. Miller, Jr., Assistant Attorney General in charge of the Criminal Division of the Department of Justice from 1961 to April, 1965, admitted that he knew that the electronic eavesdropping was planned and that he probably authorized it, saying "Go ahead and do it" (A. 247, 279; Tr. 126, 177). Miller testified that the idea of the electronic bugging originated with the Department of Justice and that he was responsible for it (A. 260, 279; Tr. 148, 178, 189).

James F. Neal, trial counsel in both the Test Fleet case and in the instant case, testified that although he had not talked to Partin, it was his "understanding" that the electronic device was placed in Partin's automobile with Partin's knowledge (A. 292; Tr. 196-197). The defense objected to Neal's statement about what he "understood", and the Court ruled that if Neal was merely testifying as to what he had been told it would not be competent

evidence.[4] Neal then admitted that he did not remember talking to Partin himself (A. 292; Tr. 197).

Neal testified that he knew ahead of time that the electronic eavesdropping devices were going to be used to record the conversation between Partin and King and thought that he had requested that the F.B.I. place the devices in the automobile (A. 292-293; Tr. 197-198). Neal admitted that he did not seek a Court order authorizing the installation of the recording equipment, although the Court was available (A. 338-339; Tr. 271-273). **He admitted that Partin's car was bugged for the purpose of interviewing petitioner King** and that King was one of the people the government was "certainly . . . considering indicting" prior to the time of the "bugged" interview (A. 308, 338-339; Tr. 222, 271-273).

Neal read the transcription of the conversation, but did not turn it over to the Court at trial. **Neal said he did not turn it over under the Jencks Act, and would not do so today** (A. 295-300; Tr. 201-210). Although Neal contended that no evidence had been used from the Partin-King conversation and that the government had not secured any evidence from any information learned from the conversation, he was not certain of the exact stage of the investigation when government witnesses Pitts and Paschal had changed their testimony from exonerating King of any wrong-doing to incriminating King of the crime charged in the indictment[5] (A. 330). Neal acknowl-

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[4] Prior to Neal's testimony, the defense advised the trial court that the government had not proved that Partin **consented** to the placement of the recording device in his automobile (A. 233; Tr. 105). The defense again reminded the Court and the government of this fact near the end of the hearing (A. 557; Tr. 1452).

[5] Government witnesses Pitts and Paschal gave earlier statements to the government that King had **not** made any attempt through Paschal to influence Paschal's wife, who was serving on the jury in the Test Fleet case. At trial, Pitts and Paschal

edged that government witnesses Pitts and Paschal might not have changed their stories so as to implicate King until **after** the return of the instant indictment (A. 330; Tr. 259), and that the only thing the government did **not** have in the grand jury was the testimony of Mr. Pitts and Mr. Paschal and that the government got that "later on" (A. 331; Tr. 261).

After government witnesses Neal, Miller and Sheridan testified at the eavesdrop hearing, the Court asked the government what information the Court had that the Partin-King overhearings were "consenual" other than the government's representation. Government counsel stated that he thought the testimony had been clear that Partin consented. Defense counsel disagreed and asked the Court to order the production of Partin as a witness, and requested that he be a witness of the Court or a witness of the government in order that the defense could question him pertaining to the consent issue. The Court denied the motion, stating that it was up to the government and to the defense to produce their own witnesses (A. 419-420; Tr. 398-399). **The government did not subpoena Partin and presented no evidence on the consent issue.**

The recording equipment was installed in and removed from Partin's automobile by two FBI agents who never saw or spoke to Partin (A. 535-540).

The conversation between Partin and King is reproduced as an appendix to the Court of Appeals opinion (App. A, *infra*, at pp. 8-16). During the conversation Partin sought and obtained from King his version of the

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changed their earlier testimony and testified as government witnesses (A. 330). Pitts testified at trial that Sheridan prior to Pitts' testimony before the grand jury in January 1963, threatened to get him and his wife indicted if "you don't tell me the truth" (A. 691; 1057a-58a). On May 14, 1963, Pitts gave a sworn statement exonerating King (A. 703-706; 1074a).

Pitts incident (i. e., the incident upon which conviction was fashioned) (Ex. 12, App. 131, 135), his fears of what Pitts testimony might be (id. 132), his fears as to whether "that highway patrolman will stay put" (id. 132), what the testimony of that "little fellow" would be (id. 133), the testimony Broda, another potential witness might give (id. 134), his inability to remember Tweel (id. 132, 135), and what he knew about phone calls made by a co-defendant (id. 137).

F.B.I. Agent William L. Sheets was liaison man between the Justice Department and the F.B.I. in the Hoffa prosecution (A. 595; Tr. 1526-1527). After he listened to the tape for days, nights and weeks (A. 602; Tr. 1539), he caused the **original** tape to be destroyed in April, 1966 (A. 603; Tr. 1539-40), although he knew King's case was then on appeal. **Sheets had no recollection of whether Partin consented to have the recording device in the automobile** (A. 629; Tr. 1582).

C. Trial Court's findings

The trial Court filed a written opinion (App. B, *infra*, pp. 18-40) overruling all pending motions and affirming the convictions and sentences heretofore imposed upon each petitioner. Judge Wilson acknowledged that the government had not disclosed to this Court that it had in its possession the recordings of the conversation between King and Partin; but noted that King did not appeal from the decision of the trial Court overruling the post-trial Motion for New Trial and accordingly was not before the Supreme Court at the time of the remand on that motion. Since the time for filing motions for new trial had elapsed the Court limited King's participation in the evidentiary hearing to rights of a constitutional or jurisdictional nature, i. e., those which could be raised by way of a petition for habeas corpus or pursuant to 28 U.S.C. 2255.

Substantively, the trial Court held that informant Partin consented to have the tape recorders installed in his automobile and although acknowledging that the overheard conversation did relate to the instant case, no taint resulted because 1) the recording was neither incriminatory nor exculpatory, and 2) the government, prior to the eavesdropping, had available to it, all of the evidence used by it at trial, including the testimony of government witnesses Oscar Pitts and Highway Patrolman Paschal (A. 122)

The Court recognized that under the teachings of **Massiah v. United States**, 377 U.S. 201, **King's Fifth Amendment rights** to refrain from giving evidence against himself **may have been violated**, but concluded that such conduct did not taint any of the evidence actually used at trial.

The Court held that the government's failure to disclose the Partin-King recording and transcript at the time of trial was not a violation of Title 18 U.S.C., § 3500 (Jencks Act) for the reason that the petitioners did not have standing to assert the matter since the time for filing a motion for new trial had expired, that petitioners' contention was merely statutory, and could not be raised in a motion filed under Title 28, U.S.C., Section 2255. The Court concluded that the recording and transcript were not Jencks' statements and even if they were, the government's failure to disclose was harmless error.

D. **Opinion of Court of Appeals**

The District Court's ruling was affirmed by the Court of Appeals in an opinion written by Brooks, J. (Peck, J., concurring, McCree, J., concurring in part and dissenting in part). The Court held that the electronic surveillances were legal, concluding that King's Fourth Amendment right to be free of illegal searches and seizures was not

violated for the reason that government informant Partin **consented** to the eavesdropping. Secondly, the Court concluded that King's Fifth and Sixth Amendment rights were not violated for the reason that he was neither interrogated while in custody, nor was there any compelling pressure applied which forced him to incriminate himself. Additionally, the Court held that this Court's decision in **Massiah v. United States**, 377 U.S. 201, was inapplicable for the reason that the surveillance took place one day prior to the return of the indictment (App. A, *infra*, p. 6).

Finally the Court held that 1) the government's suppression of the recordings and transcriptions of the conversation at the original trial did not constitute suppression of evidence requiring reversal, as contemplated by this Court in **Giles v. Maryland**, 386 U.S. 66, and **Brady v. Maryland**, 373 U.S. 83, since the conversations were neither of an incriminating nor exculpatory character; and 2) that the recording was not a statement that should have been produced under 18 U.S.C. § 3500 since it was not made **to an agent** of the government.[6]

REASONS FOR GRANTING THE WRIT

1. Violation of Fifth and Sixth Amendments.

The Court of Appeals relied upon **Hoffa v. United States**, 385 U.S. 293, in holding that the government's use of its secret informant and electronic surveillance was not in

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[6] Judge McCree would have remanded for hearing to determine whether reversal was required by the principles announced in **Napue v. Illinois**, 360 U.S. 264 (1959), for the reason that disclosure of the King-Partin transcription "raises a serious question whether the government knowingly used perjured testimony in the original trial" (App. A, *infra*, p. A-16). The majority however disagreed, saying: "Appropriate procedures which are to be originated in the District Court are available in appellate review of these matters are sought . . ." (App. A, *infra*, p. A-3).

violation of the Fifth and Sixth Amendments. The Court reasoned that this Court's holding in **Massiah v. United States**, 377 U.S. 201, does not apply here since the secret interview of King took place one day **preceding** the return of the indictment, instead of **after** King was indicted. We submit that this Court should grant certiorari here and review the legal effects of this Court's decision in **Hoffa** upon the prior holdings of this Court in **Massiah** and **Spano v. New York**, 360 U.S. 315.

Admittedly, government informant Partin, acting in concert with federal officers, after (1) the alleged crime had already been committed and reported to the government by said informant, (2) King had twice expressly asserted his constitutional privilege against self-incrimination, and (3) the government had knowledge that he was represented by counsel, surreptitiously obtained vital defense information and adduced incriminating admissions from King at the direction of the government. This was done without advising King of his rights under the Fifth and Sixth Amendments to the United States Constitution. Such conduct constituted a violation of King's rights under the Fifth and Sixth Amendments, which protect him, among other things, from being compelled to be a witness against himself, and provide that he has the right to have the assistance of counsel. **Massiah v. United States**, 377 U.S. 201; **Spano v. New York**, 360 U.S. 315.

The Court of Appeal's reliance upon **Hoffa** is misplaced for in **Hoffa**, the claimed admissions were obtained **at the same time** the alleged offense was taking place. Here, the statements were obtained long **after** the time of the alleged offense and **after** full investigation by the grand jury. All that was left to be done at the time of the surreptitious interview was the formal act of reporting out the return of the indictment in open Court, which occurred the very next day. Thus **Hoffa** does not apply here,

but **Massiah** and **Spano** do apply for the reasons that King had expressly asserted his constitutional privilege against self-incrimination, was represented by counsel and therefore was a virtual defendant at the time the government intentionally interviewed him and obtained vital defense information and admissions. **United States v. Luxenberg**, 6 Cir., 574 F.2d 241; **United States v. Stanley**, 6 Cir., 245 F.2d 427; **People v. Stendig**, 6 N.Y.S.2d 214, 216; **People v. Wallace**, 234 N.Y.S.2d 579.

The interview of King was a success, rather than failure, for the interview was not merely investigative, as investigation by the grand jury was complete. The main purpose of the interview was to obtain for the prosecution, not only evidence, but rather insight and information as to the likely defense positions in the forthcoming trial.

The purpose was well served. King not only told prosecutor Neal (**via** the recording) his version of the Pitts incident, (i.e. the incident upon which conviction was fashioned) but his fears of what Pitt's testimony might be, his fears as to whether "that highway patrolman will stay put", what the testimony of that "little fellow" would be, what the testimony of other potential witnesses might be, his inability to remember Tweel, (Tweel was a codefendant who was acquitted at the trial of this case) and what he knew about phone calls made by a codefendant.

The underlying vice complained of here, i.e. permitting the government to secretly interrogate a virtual defendant after he has already availed himself of his Fifth Amendment rights, lies in the intrusion into the defense camp so that the prosecution knows and can anticipate likely defense evidence, position and strategy. It was this type of trespass which was struck down in **Caldwell v. United States**, D.C. Cir., 205 F. 2d 879; **Coplon v. United States**, D.C. Cir., 191 F. 2d 749, and in **Massiah**. Such intrusion

makes fair trial impossible.[7] Had this evidence been known to the petitioners and their counsel at trial, a different view might have been taken for the reason that they would have had knowledge that the defense was already known to the prosecutor.

2. **Violation of Fourth Amendment.**

As of the time of the preparation of this petition, this Court had not rendered its decision in **United States v. White**, No. 13, Oct. Term, 1970[8], which was first argued in this Court in November, 1969 and re-argued in October, 1970. We submit that this Court should grant certiorari here for the reason that not only are the same constitutional questions involved in both **White** and this case, but here, the reasons for granting certiorari are more compelling. Moreover, if this Court should decide **White** prior to deciding whether to grant certiorari on the instant Fourth Amendment issues, then we urge this Court to apply the teachings of **White** in making said decision.

The law has been clear for many years that the government has the burden of proving that its warrantless

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[7] The government's intentional misconduct constituted federal constitutional error which affected petitioners' substantial rights, and therefore the petitioners need not show prejudice for reversal. Additionally, since the error committed was of constitutional proportions and the record does not negative, but affirmatively shows a reasonable possibility of prejudice to petitioners, the convictions must be reversed. **Chapman v. California**, 386 U.S. 18; **Shields v. United States**, 273 U.S. 583; **United States v. Schor**, 2 Cir., 418 F. 2d 26; and **Evans v. United States**, 6 Cir., 284 F. 2d 393.

[8] **United States v. White**, 7 Cir., 405 F. 2d 838, cert. gr. 394 U.S. 957. In **White**, the Court of Appeals sitting *en banc* held that defendant's Fourth Amendment rights were violated when government agents electronically overheard conversations between defendant and an informant with the consent of the informant. Clearly, the Seventh Circuit's decision in **White** is in direct conflict with the decision by the Sixth Circuit in the instant case.

searches outside judicial process and without prior judicial approval were conducted under such exceptional circumstances that it can validly claim an exemption from the general rule that requires the obtaining of prior judicial approval. **Wong Sun v. United States**, 371 U.S. 471; **United States v. Jeffers**, 342 U.S. 48, 51; **Chimel v. California**, 395 U.S. 752; **United States v. Rivera**, 2 Cir., 321 F. 2d 704. Here, not only does the record fail to show exceptional circumstances why the government intentionally failed to obtain prior judicial approval, but government trial counsel (Neal) admitted that a federal judge was available to the government for the obtaining of a warrant at the time of the electronic bugging (A. 339, Tr. 271-273). Thus, the government has never attempted to establish "exceptional circumstances."

The constitutional violations here are far more serious than those in **White**. In **White**, the bugging took place at the time of the alleged crime (sale of narcotics), but here, the alleged crime had been committed months previously and King was a virtual defendant at the time of the interview. Clearly, there were no overriding reasons for eliminating the necessity of obtaining prior judicial approval here. The government patently chose not to take the risk of asking the Court to approve the surrepititious interview for fear the request would be rejected. Cf. **Osborn v. United States**, 385 U.S. 323.

The District Court and the Court of Appeals held that the eavesdropping did not violate the Fourth Amendment because Partin **consented** to have the "bugs" installed in the car. As we have shown in our "Statement", *supra*, the record does not confirm that Partin gave his consent. Contrariwise, the record affirmatively establishes the definite possibility that Partin did not know that his conversation with King was being recorded.

For instance, Partin testified at trial that he never agreed to be an informer, never tried to trap anyone and

was never given any listening device by the government. If this testimony was true, then it would **not** be consistent with the government's claim here that Partin gave his consent.

Although it was not petitioners' burden to show that consent was **not** given,[9] defense counsel called to the trial Court's attention the insufficiency in the government's proof and even suggested that Partin be called as a witness. The trial Court denied the request and government counsel failed to subpoena Partin. In sum, the record does not contain any competent evidence that Partin gave his consent.

Once it is recognized that the government electronic eavesdropping was not consensual, then under this Court's holding in **Silverman v. United States**, 365 U.S. 505, the convictions must be reversed. Further, assuming *arguendo* that Partin did give his consent, then this Court should grant review for the previously stated reasons.[10]

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[9] **Bumper v. North Carolina**, 391 U.S. 543; **Wren v. United States**, 10 Cir., 352 F. 2d 617; **Simmons v. Bomar**, 6 Cir., 349 F. 2d 365; **Judd v. United States**, D.C. Cir., 190 F. 2d 649; **Kovach v. United States**, 6 Cir., 53 F. 2d 639.

[10] Assuming that the conviction of King was violative of his constitutional rights and as a consequence must be set aside, so must the conviction of Hoffa for the following reason: Hoffa and King were charged and convicted under Count V of the indictment of endeavoring to influence juror Mrs. Paschal. King was charged as a principal, and Hoffa was charged under Title 18, U.S.C., Section 2, with aiding and abetting King in the commission of said offense. Under these circumstances, the validity of Hoffa's conviction on said count is dependent on the validity of King's conviction. Hoffa could not have been convicted of a crime under this count unless King was properly convicted.

The majority of the Court of Appeals did not decide this question, however, they did indicate that Hoffa had more of a concrete right than the remaining petitioners (App. A, *infra*, p. 5). Further, the Sixth Circuit in **Kinser v. Cooper**, 6 Cir., 413 F. 2d 730 (1969), held that where the conviction of an aider and abettor was constitutionally infirm and could not

3. Government's suppression at trial of King-Partin transcript violated petitioners' right of due process and 18 U.S.C., Section 3500.

The District Court, among other things, held that no petitioner could urge failure of the government to produce the Partin-King transcript at trial, inasmuch as the issue had never been raised before and its suppression by the government was neither a jurisdictional nor constitutional error reversible in a post-conviction proceeding (App. B, *infra*, p. 38). We submit that it is a violation of due process to hold that petitioners were not timely in their objection to the government's failure to produce the Partin-King transcription, where efforts to obtain same were actively thwarted by the government's intentional suppression of its existence. Here, the petitioners at trial actively and vehemently demanded not only all Jenck's statements, but all electronically recorded conversations of their voices. Thus, it is clear that petitioners did not knowingly waive anything. We submit that to permit the government to remain silent as to the existence of this tape recording through the appeals and to this Court, and then to hold that the defense is out of time to raise a newly confessed governmental error is violative of Due Process and the spirit of fair play inherent in American jurisprudence.

When the defense at trial made its demand for Partin's Jenck's statements, the government, unilaterally and in an *ex parte* manner, determined, without any judicial supervision, that the transcript of the Partin-King conversation did not constitute a "statement" within the

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be permitted to stand, the conviction of the principal must also fall. *A fortiori* where, as we have shown, the conviction of the alleged principal (King) was violative of his constitutional rights and as a consequence must be set aside, so should the conviction of Hoffa also be set aside.

meaning of 18 U.S.C., § 3500. Such action was, as stated in **Palermo v. United States**, 360 U.S. 343, 354 (1959) "destructive of the statutory purpose" of 18 U.S.C., § 3500. See also **Rosenberg v. United States**, 360 U.S. 367. The Court of Appeals did not consider this issue, but merely held that the recorded conversation between King and Partin was not a statement that should have been produced under 18 U.S.C., § 3500. The Court concluded that the recorded conversations were not statements made to an agent of the government.

Thus, the Court's holding is contrary to the holding of this Court in **Palermo.** For, the decision condones the government's unilateral and *ex parte* determination of whether or not to produce documents which, at the minimum, were questionable Jenck's Act statements. Such a holding destroys the statutory purpose of the Jenck's Act.

The Court of Appeals relies upon the Seventh Circuit's decision in **United States v. Soffer,** 7 Cir., 362 F. 2d 523 to support its holding that the recordings are not Jenck's statements. **Soffer** held that the tape recording of a conversation of a bribe effort need not be produced after the bribee testifies during trial about the extortion itself, since the tape recording was a contemporaneous transcription of the crime itself and "not a recital of a past occurrence by a prospective witness and is not within the general purview of Section 3500." 362 F. 2d at 525. Here, the recording was made at the direction of agents of the government and intended to be delivered to them. It was made on their equipment, installed by their agents, and transcribed and retained for use and review of government agents. The transcript of the conversation constituted a statement under the Jenck's Act as surely as if Partin had given the details of the events to Sheridan who in turn wrote them down. Also, the recording was

not a contemporaneous transcription of the crime itself as it was in **Soffer.**

Indeed, the Partin-King conversation intrinsically impeaches Partin's trial testimony. A simple reading of the transcription shows that Partin was seeking inculpatory statements from King. Since King made no incriminatory statements in the bugged interview, something highly unlikely if he had already admitted his guilt to Partin, the trial jury likely would have concluded that Partin was lying when he testified that King had previously told him he was guilty. At the least, the transcription would have been a tremendously important piece of evidence to be used ". . . before the jury by way of cross-examination and impeachment . . ." **Harris v. New York,** . . . U. S. . . ., No. 206, October Term, 1970; **Brady v. Maryland,** 373 U.S. 83; **Giles v. Maryland,** 386 U.S. 66.

This Court should review the Court of Appeals' interpretation of the Jenck's Act and decide whether or not such a transaction does fall within the purview of the statute. Further, the Court should review the lower Court's holding that condones the government's unilateral and *ex parte* determination, which if permitted in the future, will surely destroy the statutory purpose of 18 U.S.C., §3500.

CONCLUSION

For the reasons stated herein, we respectfully submit that the petition should be granted.

Respectfully submitted

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APPENDIX A

No. 20271
No. 20272

United States Court of Appeals
For the Sixth Circuit

No. 20,271
United States of America,
Plaintiff-Appellee,
v.

James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King,
Defendants-Appellants.

No. 20,272
United States of America,
Plaintiff-Appellee,
v.

Ewing King,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Tennessee.

Decided and Filed January 21, 1971.

Before: Peck, McCree and Brooks, Circuit Judges.

Brooks, Circuit Judge. In March of 1964 defendants-appellants, James R. Hoffa, Thomas Ewing Parks, Larry Campbell and Ewing King, were convicted for endeavoring to influence, impede and intimidate jurors in the dis-

charge of their duties. (18 U.S.C. § 1503—The Federal Obstruction of Justice Statute.) The alleged jury tampering involved attempts by these defendants to influence jurors who served on a case in which Hoffa was a defendant—the Test Fleet Case. Following the convictions for jury tampering, appellants filed motions for new trial which were denied and each conviction and the denial of the motions for new trial were affirmed by this Court, **United States v. Hoffa**, 349 F.2d 20 (6th Cir. 1965), affirmed 385 U.S. 293 (1966), reh. denied 386 U.S. 940 and 386 U.S. 951 (1967). A second group of motions for new trial were filed by appellants and denied. See **United States v. Hoffa**, 247 F.Supp. 692 (1965), affirmed 376 F.2d 1020 (6th Cir. 1967), cert. denied 389 U. S. 859 (1967). Appellants then filed a third round of motions for a new trial alleging newly discovered evidence. These motions were also denied, **United States v. Hoffa**, 247 F.Supp. 692 at 698 (1965), affirmed 382 F.2d 856 (6th Cir. 1967), cert. denied 390 U.S. 924 (1968). Finally, a fourth group of motions for new trial were filed, and it is a result of these motions that this case comes to us for review. This fourth attempt to obtain a new trial was denied by the District Court, **United States v. Hoffa**, 268 F.Supp. 732 (1967), and affirmed by this Court, 398 F.2d 291 (6th Cir. 1968). Appellant King did not perfect an appeal from the denial of his fourth motion for a new trial. After this Court affirmed the last denial of the motions for a new trial, 398 F.2d 291 (6th Cir. 1968), a certiorari petition was filed in the United States Supreme Court. While this certiorari petition was pending, the Solicitor General of the United States, complying with the Supreme Court's decision in **Kolod v. United States**, 390 U.S. 136 (1968), disclosed that "although none of these petitioners was ever the subject of electronic surveillance directed against him two of the petitioners did participate in conversations which were monitored during the course of electronic surveillance directed against others." The Supreme Court then

granted certiorari, set aside the judgment of this Court, and remanded the case to the District Court to determine "whether the surveillances at issue were lawful." See, **Giordano v. United States**, 394 U.S. 310 (1969).

While the Supreme Court's remand order applied to only appellants Hoffa, Parks and Campbell, the District Court permitted appellant King to participate in the remand hearing treating his motion as a petition for habeas corpus. At the time of the remand hearing, all appellants except Hoffa had completed serving their sentences. After a six day evidentiary hearing to determine the lawfulness of the surveillance, the District Court concluded "that no violation of any defendant's rights has been shown under the direction given by the United States Supreme Court in **Giordano v. United States**" and affirmed the convictions and sentences imposed upon the defendants. See, **United States v. Hoffa**, 307 F.Supp. 1129 (1970). It is from this ruling that appellants have now appealed. As can readily be seen, the history of this litigation is long and involved. However, on this appeal we are only presented with the question of the correctness of the District Court's ruling on the legality of the electronic surveillances, and we affirm that determination.[1]

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[1] The limited scope of appellate review in this case is dictated by the Supreme Court's remand order in **Giordano v. United States**, 394 U.S. 310, 311-12 (1969). There it was spelled out that since "[i]t is not evident from the records . . . whether the surveillances at issue were unlawful . . . 'the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful.' Of course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary." The newly discovered facts developed during the remand hearing and referred to in Judge McCree's opinion concurring in part and dissenting in part are not properly before us, see **United States v. Beal**, 404 F.2d 58 (6th Cir. 1969), cert. denied 393 U.S. 1084; **United States v. Aguillar**, 387 F.2d 625 (2nd Cir. 1967), and appropriate procedures which are to be originated in the District Court are available if appellate review of these matters are sought. See, Rule 33, Federal Rules of Criminal Procedure.

The electronic surveillances in these cases were accomplished by wire tapping of telephones and "bugging" (strategic placing of an electronic receiving device so as to overhear the conversation of individuals within proximity of the device). The Hoffa surveillances consisted of four wire taps of the executive offices of two gambling casinos in Las Vegas, Nevada, and three monitorings of radio telephone conversations over special FM frequencies in Detroit, Michigan. The District Court concluded that these surveillances did not violate the rules established in **Wong Sun v. United States**, 371 U.S. 471 (1963), as to surveillances accomplished by means of trespass, and none of appellant Hoffa's constitutional rights were violated.

Appellant Campbell's surveillance consisted of some 254 monitoring of radio telephone conversations. These monitorings were accomplished by simply listening in on a special FM frequency that the Teamsters Union used in transacting business by radio telephone. The District Court concluded that since anyone with an FM receiver could have heard these conversations, there was no violation of appellant Campbell's Fourth Amendment rights.

There were no electronic surveillances of appellant Parks, and the thrust of his argument on this appeal is that the surveillances of Hoffa, Campbell and King, if illegal, in some way violated his constitutional rights. This same argument is made by appellants Hoffa and Campbell with respect to the surveillances of appellant King. On this appeal, neither Hoffa nor Campbell challenge the District Court's ruling on the legality of their respective surveillances, but rather question the correctness of the District Court's ruling on the legality of King's surveillance. Since it is concluded that the King surveillance was legal, it is not necessary to reach the issue of whether appellants Hoffa, Campbell and Parks have stand-

ing to raise alleged violations of appellant King's constitutional rights.[2]

There was only one electronic surveillance (a "bugging") of appellant King, and it is this surveillance appellants argue was unlawful. An associate of the appellants who was also a government informant had his automobile wired with an electronic receiver and tape recorder. The informant arranged a meeting with appellant King and the two men rode around Nashville, Tennessee, in the informant's automobile engaging in a ninety minute conversation which was taped.

Appellant King raises several constitutional challenges to this surveillance. First, it is alleged that the surveillance violated his Fouth Amendment right to be free of illegal searches and seizures. The taping of the conversation between the government informant and King took place with the consent of the informant, see, **Kaufer v. United States**, 391 U.S. 458 (1969); **Lopez v. United States**, 373 U.S. 427 (1963); **On Lee v. United States**, 343 U.S. 747 (1952); cf. **United States v. Osborn**, 350 F.2d 497 (6th Cir. 1965), **affd. Osborn v. United States**, 385 U.S. 323 (1966); and was not the by-product of a trespass onto appellant's premises, see, **Alderman v. United States**, 394 U.S. 165, 171-176 (1969). Cf. **United States v. Hoffa**, 349 F.2d 20, 48 (6th Cir. 1965). Thus, under existing Supreme Court interpretation, it cannot be said that King's Fourth Amendment rights were violated by the fashion in which this electronic surveillance was accomplished.

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[2] Appellant Hoffa's right to raise alleged violations of appellant King's constitutional rights also stems from the fact that Hoffa was indicted and convicted as an aider and abettor of King for jury tampering. Because of this fact, Hoffa may have more of a concrete right than Campbell or Parks to raise questions about the validity of the King surveillance. However, as we conclude that the surveillance was legal, we do not reach this question.

Second, King alleged that his Fifth and Sixth Amendment rights were violated by the government's surveillance of this conversation. It is argued that the surveillance was constitutionally impermissible because it resulted in his giving evidence against himself without being advised of his Fifth Amendment rights or his right to assistance of counsel. The difficulty with appellant's challenges to the surveillance on Fifth and Sixth Amendment grounds is that they require an unwarranted extension of existing case precedents. Respecting the claim of violation of appellant's Fifth Amendment right, present case law, notably **Miranda v. Arizona,** 384 U.S. 436 (1966), requires some element of compulsory self-incrimination. Here there was neither an in-custodial interrogation nor any compelling pressure applied which forced appellant to incriminate himself. See also, **Hoffa v. United States,** 385 U.S. 293, 304 (1966). Furthermore, appellant's attack on the surveillance based on alleged violation of his Sixth Amendment right to assistance of counsel does not find support in present case law. See, **Massiah v. United States,** 377 U.S. 201 (1964); **Escobedo v. Illinois,** 378 U.S. 478 (1964). In **Escobedo** there was an in-custodial interrogation **after** arrest without assistance of counsel and in **Massiah** the surreptitious surveillance took place **after** indictment following Massiah's retention of counsel, pleading not guilty to the charge for which he was indicted and his release on bail. In this case the surveillance of appellant King took place the day preceding his indictment. An argument similar to appellant's based on the contention that at the time of the surveillance he was "a virtual defendant" was made by appellant Hoffa in the initial appeal of this case and rejected by the Supreme Court. See, **Hoffa v. United States,** 385 U.S. 293, 309 (1966). Accordingly, it is concluded that appellant King's Sixth Amendment right to assistance of counsel was not violated by the surveillance in this case.

Appellant also maintains that government non-disclosure of the surveillance and recording of the conversation at the original trial constituted suppression of material evidence under the rules recognized in **Giles v. Maryland**, 386 U.S. 66 (1967), and **Brady v. Maryland**, 373 U.S. 83 (1963). At the evidentiary hearing upon remand by the Supreme Court, the District Court reviewed the transcribed text of the conversation and concluded that "while portions of the recording do relate to the case, they are neither of an incriminating nor an exculpating nature." (Appended to this opinion is the text of the conversation.) A reading of the **Brady** decision indicates that suppression of evidence following request for disclosure violates due process "where the evidence is material either to guilt or to punishment . . . ." **Brady v. Maryland**, 386 U.S. 66 at 87. Independently reviewing the conversation, we agree with the District Court's conclusion that the conversation was neither of an incriminating nor exculpatory character requiring disclosure.

The last argument raised by appellant is that non-disclosure of the surveillance at the original trial, following a request for production of all electronic surveillances, violated 18 U.S.C. § 3500—The Jencks Act. The simple answer to this contention is that 18 U.S.C. § 3500 applies to production of statements "made by a government witness or prospective government witness (other than the defendant) to **an agent** of the government . . . ." (Emphasis added). The recorded conversation between appellant King and the government informant is simply not a statement made "to an agent of the government." See, **United States v. Sopher**, 362 F.2d 523, 526 (7th Cir. 1966), cert. denied 385 U.S. 928 (1966).

The judgment of the District Court is affirmed.

Appendix

UNITED STATES DISTRICT COURT
EXHIBIT No. 12

Transcription of Tape Recording

King: Ed, I'm sure glad you came out of that damn thing down there.

Partin: Picked that damn paper up there and read about the thing coming up tomorrow, and get a book and it's in the book. Which way you?

King: Go straight on down.

Partin: Who is that fellow Tibbens or Tippens mentioned in that book?

King: He's the one that came in here and reported to the Judge while they were trying to select a jury that he had been offered some money and that, that, and the other.

Partin: What does he do?

King: . . . I don't think he does anything, Ed.

Partin: . . . do you reckon they got enough to bring out some indictments on that thing up there?

King: I don't know. I doubt seriously that with a story like this in here that they will bring indictments. There's a little piece in the paper today, I don't know whether you saw it or not, saying the grand jury would have to meet to return indictments.

Partin: Damn if they didn't have you.

King: They shore got me in there haven't they?

Partin: The only thing they missed was where you were going hunting so they must not give the whole story, must have added a lot together.

King: The truth of the matter is, Ed, the night I went down to this place, went down there and met with this Mutt Pitts and went to his house . . . and when you come right down to it, now this is the actual facts, I told my wife I had to go to Mutt's place; that we were going to arrange for a rabbit hunt Thanksgiving. I wanted to try out this old car I got off George anyway to see whether it was any good or not. When we got down there, this old boy's wife's daddy is real bad sick, but he's a real good friend of mine, real good, and we sat up there and drank coffee and had some cokes for a while. This old boy said we ought to be able to see him in a few minutes, I'll go down and see and get some Coca Colas. When he came back he said this old boy wants to see you after while. He wants to get a promotion. He has been on the patrol 12 years. So we talked, and we talked, and we made him talk, or I made him talk. And then, I don't know whether he has changed his story or not. They say that he has, but this story in the magazine says he hasn't. The magazine is still writing the same story that he gave before the damn court up there. So, I don't know whether he has or whether he hasn't, but in view of this very thing during this time and many many other times the record will prove that I have been to every one of them suckers, these boys at one time or another to get promotions for these guy. So, hell fire, I talked to the Governor the other day. He said I'm so glad that Jimmy Hoffa beat them. . . . He sure did. I talked to the Chief of Police last night, right over there, and he said I'm so glad that Hoffa outsmarted everybody up there. . . . That's about all I've heard recently.

Partin: Do you think that if they got indictments they can convict anybody here . . .?

King: I doubt it very seriously. I doubt it very very seriously. I sure do. I'm going to get me a lawyer and

beat their ass. There's one here in town that can beat any of them—Jack Norman. I'll get him.

Partin: Now, look this fellow that they called. Do you know Tweel?

King:(Unintelligible, but apparently a negative reply.)

Partin: Do you think that highway patrolman will stay put?

King: I have always believed he would stay put. However, there have been a lot of rumors circulating around that he has changed his story from what he told the Court because he was afraid and all this, that and the other but I do not believe he has done it. And I don't see how anybody else would know it either, you know, unless they've been in there. So, as far as I am concerned there's, and Jim, I been in Philadelphia with him for a week, every day, he don't believe that they will even get any indictments, not after this long period of time. Five months have gone by.

Partin: Speaking of Chuck, I don't know how to figure Chuck. One night we were coming from O'Brien's in a cab, and he drove around and around and around and all of a sudden jumped out, said I'll see you later, and got in an old two tone Buick. Acted like he was scared to death . . . .

Partin: I read in the paper about that damn longshoreman . . . .

King: I am not convinced that they can get a conviction on me or anybody else since they have taken as much time as they have. If it takes them that long for them to get us, it will take them a damn sight longer to make them stand up.

Partin: Is Jimmy worried?

King: Don't seem to be, a bit.

Some talk here about Fields.

Partin: What's he doing now? (Believed to refer to Don Vestal).

King: Nothing that I know of. Was with steelworkers last account I had of him. They made me put him back and I'm fixing to put him back out on the . . . as soon as I can have a board meeting.

Partin: He don't come to the hall, or nothing?

King: He comes to the meetings but he won't stay but about 15 or 20 minutes. I start lowering the boom on his ass and he will leave right away.

Some talk here about where Vestal lives—talk about some grievance and about somebody retiring. Some speculation as to whether Vestal lives on Grandview Drive or Avenue.

King: If that highway patrolman stays put, they ain't got a thing.

Partin: What about that little fellow . . .?

King: Who went with me? He's just as solid as that bus up yonder. Yes, sir, I was down to his house just a little while back. Me and my wife were down there Sunday evening. That's when I called up the Marshal and told him I was going down there and if he wanted to go he wouldn't have to drive his own car, he could go with me.

Partin: You know where they sell General tires? I need me one on the left front wheel.

King: There's one down on Broad Street.

Some talk about a union election lost by Teamsters to Steelworkers.

King: Those fellows up yonder (meaning Philadelphia), they damn near run me crazy. That was a rough deal up there. One boy went wild, he went all to pieces. One of our men. . . .

Partin: Wonder how many indictments they will come out with?

King: They will either come out with a real small amount, Ed, or they will get a whole damn bunch of us. I'm convinced that they are going to indict me, a boy out of Detroit, Larry Campbell, Chuck, Hoffa, and maybe at least three more. . . .

Partin: Looks to me like they will have a rough time getting a Judge who doesn't know all about this thing.

Partin: How will Broda stand up?

King: He's all right, Ed, he don't know a thing.

Partin: Does he know anything about me at all?

King: No, sir, Ed, he don't know a thing in the world about me. As far as he knows the night we swapped cars we swapped for the purpose of him trading for the Thunderbird and me taking his car. That's all he knows now. I wouldn't have, you see I knew how weak he was. If somebody hit him over the head with a blackjack he would sing the star spangled banner . . .

Partin: I believe Twell is the weak link in this thing. I always will believe it.

King: Do you reckon?

Partin: He hasn't come around. He told me he wanted me to meet him in Miami; that he would call me and he ain't called me yet.

King: I guess I remember the man, but I can't place him.

King: I have another man here who is really giving me all the trouble he can . . . Perry Canaday, that served that workhouse sentence about four years ago on the

barber shops. He works with Super Service. He's telling everybody he can run into he hoped they put me in the penitentiary. He's mad at me because I would not hire him. I couldn't hire him on account of his record, if I wanted to. I did not want to in the first place because he is stupid. He's beati g his gums everyday and one of these days I am going to have to knock him on his ass myself, as sure as God made little apples . . .

Partin: Didn't you see them damn cars following you like that book said?

King: Well, they didn't follow me period they were watching Paschal's home and once they saw this car with Nashville license in the driveway of this Paschal's home, then's when they turned to the . . . You see they hadn't seen me. That is the reason you know the magazine said they put these spotters out to watch me when I got home to make sure I was driving that car because they did not put me in that car down there. They didn't follow me to Woodbury. They were watching Paschal's house and when Mutt Pitts took my car and went down there to get some cola colas and went by James Morris' house to see whether he had come in or not, that's when they got suspicious and wondered who was driving the car and everything.

King: Pull up on that rack right there. I used to know an old boy out here. Don't know whether he is still out here or not.

(Apparently stopped at McDowell General Tire Service and had a tire put on front wheel. Were out of the car most of the time.)

King: Okay Bob, good to see you.
Partin: Man, that saved me $18.00.

King: We could go back out this way and hunt that house up for sure . . . It's 1012 instead of 1211.

Partin: You all had a lot of fun in Philadelphia?

King: . . . I talked to Jim for an hour and a half. I told him I was going back to Tennessee; that I had a flig. t out the next morning. They are two hours faster than we are. I got home in time to do a day's work. We stayed up so damn much up there, day and night. I got a cold and I ain't been able to throw it off yet.

Partin: His spirits were pretty good after that?

King: Oh yeah . . . After the vote came in, we went down to the union hall.

Partin: Didn't they indict Chuck up there?

King: Hell yes, we talked about that. Jim said it wouldn't count up. Indicted him on that car and that damn ship deal. A convoy off a ship or something or other. Of course, he's an eager beaver . . . He shakes down every operator that he has anything to do with . . . He told me this himself.

Partin: That's what hurts us, things like that.

Partin: Bufalino told me Campbell got messed up with some whores up there . . .

King: Is that right?

Some talk of Jimmy giving someone two minutes to get out of town. Some more talk about Campbell. King indicated he saw Campbell in Detroit and Campbell said he had tried to call King when he was in Nashville for the grand jury.

Partin: What about that fellow Bell, did I ever meet him?

King: I don't know. I didn't, Ed, I probably saw him.

Partin: He must have gone crazy on that damn phone, the way the paper talked.

King: Most of his calling was from out of town though, it wasn't in town. He called Tenpenny, Mutt Pitts and this highway patrolman and everybody else.

Partin: Did he know them?

King: He was trying to buy a race horse.

Partin: You are talking about that guy on the jury?

King: No, that official—that longshoreman, Bell.

King: He called them from Memphis and everywhere he stopped.

Here, they apparently located a house at 1012 Grandview Avenue. King gave Partin instructions as to how to go out of town, by going out Granny White Pike. King said something about having called Dick Farrel.

King: Jim, he's been just jam up with me.

Partin: You went all out for him. He ought to be.

King: He told somebody up in Philadelphia the other day, this is Ewing King, said he helped me down in Nashville more than anybody will ever know.

Partin: I laughed that morning you told Jimmy that woman would sit there til hell froze over.

King: That would have happened.

Partin: That was on account of kicking that woman off?

King: Yep.

Partin: He brightened up too, didn't he?

King: Yes.

King: He (apparently referring to O'Brien) told me more lies than you ever heard tell of. He said his Daddy

got killed on a picket line. Jimmy raised him up since he was three years old. I was putting up with a lot of bull.

Partin: Why did Jimmy get messed up with him?

King: Family obligations . . .

Partin: Why did he get messed up with that stuff on the ship?

King: Ed, that's just one of those things . . . He gets himself into everything that comes along.

Some talk here about John J. Hooker, Sr. and John J. Hooker, Jr.

King: Miller (possibly referred to Judge William E. Miller, U. S. District Court) hates me with a passion.

Partin: Who don't he hate?

King: I haven't lost a thing with him, so that feeling is mutual.

Here, they exchanged pleasantries, said good-by.

McCree, Circuit Judge (Concurring in part and dissenting in part). I concur in the opinion of the court insofar as it affirms the District Court's ruling on the legality of the electronic surveillance employed in the investigation of this case. However, the fact, revealed for the first time during the hearing on remand, that Edward Partin participated in the recording of a conversation between Partin and King while they were seated in Partin's automobile raises a serious question whether the Government knowingly used perjured testimony in the original trial. Partin testified, on a motion to suppress evidence, that Walter Sheridan, the agent in charge of the investigation, had never given him any device or listening instrument to assist him in his work. Transcript at 3006A. At the hearing to determine the legality of the recording of the King-Partin conversation, Sheridan testified that Partin had made his car available for the concealed installation of the

instruments and recorder. Testimony by James Neal, the prosecuting attorney, indicates that he was aware of the fact that Partin had cooperated in securing that recording.

The Partin testimony was crucial to the conviction of appellants. Had the Government revealed that Partin perjured himself during the trial, defense counsel could have used that fact to impeach this key Government witness.* I would remand the case to the District Court for a hearing to determine whether reversal is required by the principles announced in **Napue v. Illinois**, 360 U.S. 264 (1959).

* Although I am aware of the limited scope of the Supreme Court's remand order in this case, I do not believe the District Court should thereby be prevented from taking cognizance of the possibility of a departure from basic fairness which might have tainted the outcome of the trial.

APPENDIX B

In the United States District Court for the
Eastern District of Tennessee
Southern Division

United States of America vs. James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King	Criminal No. 11,989

Opinion

(Filed: 1/20/70)

The defendants, James R. Hoffa, Thomas Ewing Parks, Larry Campbell, and Ewing King, were convicted on March 4, 1964, of willfully endeavoring to influence, intimidate, and impede jurors in the discharge of their duties, in violation of the Federal Obstruction of Justice Statute (18 U. S. C., § 1503). The subsequent history of this litigation is set forth in a footnote.[1] Suffice it here to say that the conviction of each defendant was affirmed by the Court of Appeals and by the United States Supreme Court and the defendants were ordered into custody to serve their respective sentences. Each defendant has

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[1] The initial motion for new trial, filed March 10, 1964, was overruled. On appeal the conviction of each defendant and the denial of their first motion for new trial was affirmed, **United States v. Hoffa,** 349 F. 2d 20; affirmed 385 U. S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 708 (1966), rehearing denied February 27, 1967, 387 U. S. 951, 17 L. Ed. 2d 880, 87 S. Ct. 970 (1967).

A second motion for a new trial was filed on March 18, 1964, alleging newly discovered evidence. This motion was denied. **United States v. Hoffa,** 247 F. Supp. 692 (1965), and the denial

now completed serving his sentence other than the defendant Hoffa.

The case is presently before the Court upon the defendants' fourth motion for a new trial. The motion was originally filed in this court upon February 28, 1967, one day following the action of the United States Supreme Court in affirming the defendants' convictions and in denying a rehearing thereon. The defendants' fourth motion alleged that the defendants had obtained newly discovered evidence that they and their attorneys were subjected to unlawful surveillance by government agents by means of wiretapping, electronic eavesdropping, or other intrusions both prior to and during the trial in which they were convicted. The allegations of the motion being denied by the Government, the Court set an evidentiary hearing. Upon the date of the evidentiary hearing, however, counsel for the defendants declined to proceed, advising the Court that as a matter of legal ethics they did not feel that they could proceed with the evidentiary hearing, nor, as a matter of obligation to their clients, did they feel that they could disclose unto the Court the reasons for so declining to proceed. The Court thereupon overruled the fourth motion for new trial upon the default of the defendants and upon the record before the Court. **United States v. Hoffa**, 268 F. Supp. 732 (1967). No appeal was taken by the defendant King from the order of this Court denying the fourth motion for new trial. The

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was affirmed on appeal 376 F. 2d 1020 (1967), cert. denied 389 U. S. 859, 19 L. Ed. 2d 124, 88 S. Ct. 102 (1967).

A third motion for a new trial, alleging newly discovered evidence, was filed September 1, 1965. This motion was denied. **United States v. Hoffa**, 247 F. Supp. 692 at 698 (1965); see also 245 F. Supp. 772 (1965). The denial of the third motion was affirmed on appeal. **United States v. Hoffa**, 382 F. 2d 886 (1967), cert. denied 390 U. S. 924, 88 S. Ct. 854 (1968).

The history of the fourth motion for a new trial is recited in the body of this opinion.

other defendants did appeal. The Court of Appeals affirmed the action of this Court in denying the fourth motion for new trial. **United States v. Hoffa,** 398 F. 2d 291 (1968). A petition for certiorari was then filed by the defendants Hoffa, Parks and Campbell. While this petition was pending before the United States Supreme Court, and in response to the petition, the Solicitor General of the United States made the following representation unto that Court:

> "In light of this Court's decision in **Kolod,** we wish to disclose to the Court that although none of these petitioners was ever the subject of electronic surveillance directed against him, two of the petitioners did participate in conversations which were monitored during the course of electronic surveillance directed against others (Brief for U.S. in opp. No. 546 O.T. 1968)."

Upon this disclosure being made by the Government, the Supreme Court granted the petition for certiorari, set aside the judgment of the Court of Appeals, and remanded the case to this Court. See **Giordano v. United States,** . . . U.S. . . ., 22 L. Ed. 2d 297, 89 S. Ct. . . . (1969). The directions on remand, as stated in the **Giordano** case, were:

> ". . . The judgments of the Courts of Appeals in these cases are vacated, and the cases remanded to the respective District Courts for further proceedings in conformity with Alderman v. United States; Ivanov v. United States, and Butenko v. United States, . . . U.S. . . ., 22 L. Ed. 2d 176, 89 S. Ct. . . . . It is not evident from the records in some of these cases whether the surveillances at issue were unlawful. It may be that the overhearings in some instances were not achieved by trespass, see Katz v. United States, 389 U. S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967);

Desist v. United States, ... U. S. ..., 22 L. Ed. 2d 248, 89 S. Ct. ..., and Kaiser v. New York, ... U. S. ..., 22 L. Ed. 2d 274, 89 S. Ct. ..., or for some other reasons were not unlawful. As we held in Alderman, Ivanov, and Butenko, 37 U. S. L. W., at 4190, n. 3, 22 L. Ed. 2d at 184, 'the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful.' Of course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary. Similarly, it is not clear that each petitioner has standing to assert the illegality of the surveillance or of the introduction of its fruits. As in Alderman, Ivanov, and Butenko, these issues are to be resolved by the District Courts in the first instance."

Turning to the case of **Alderman v. United States**, ... U. S. ..., 22 L. Ed. 2d 176, ... S. Ct. ..., for further guidance on this remand, the record there reveals that the Government first disclosed in the United States Supreme Court that it had engaged in electronic surveillance of the defendants. Concluding that an issue might exist as to whether such electronic surveillance violated the search and seizure provisions of the Fourth Amendment and that, if so, a further issue might exist as to whether any evidence so obtained tainted the defendants' trials, the Supreme Court remanded the case of each defendant to the District Court for determination of these issues. The Court defined the issues for determination on remand in the following language:

"The judgment(s) . . . are vacated and each of the cases is remanded to the District Court for further proceedings consistent with this opinion, that is, for a hearing, findings, and conclusions (1) on the question of whether with respect to any petitioner there

was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance."

In the light of the directions in **Giordano** and in **Alderman**, it is appropriate at this point to delineate certain of the guidelines provded by the Supreme Court for conducting proceedings of this nature. The Court does not here propose to undertake a general discussion of the developments in the law of searches and seizures, beginning with **Olmstead v. United States**, 277 U. S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928), which have resulted in wiretapping, electronic surveillance and eavesdropping being considered a form of search and seizure subject to the Fourth Amendment limitations.[2] Suffice it to say that the present state of the law on the subject is such that evidence obtained by the Government as a result of electronic surveillance may not be used upon a trial when it has been obtained in violation of the Fourth Amendment rights of an accused, and a conviction obtained as a result of the use of such evidence must be set aside and a new trial granted.

Initially, it should be noted that since the surveillances involved in this case occurred prior to the decision of

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[2] For a history of the developments in this respect see "Wiretapping and Eavesdropping: A Case Analysis," 36 **Tenn. L. Rev.** 362 (1969). See also Western, "The Wiretapping Problem: An Analysis and a Legislative Proposal," 52 **Col. L. Rev.** 165 (1952); Dash, "The Eavesdroppers" (1959); **Katzenbach**, "An Approach to the Problem of Wiretapping," 32 **F. R. D.** 108 (1963); Schwartz, "Electronic Eavesdropping—What the Supreme Court Did Not Do," 4 **Criminal Law Bulletin** 83 (1968); Sullivan, "Wiretapping and Eavesdropping: A Review of the Criminal Law," 18 **Hastings Law Journal** 175 (1959); Davis, "Electronic Surveillance and the Right of Privacy," 27 **Mont L. Rev.** 173 (1966); Williams and Keenan, "Wiretapping and Eavesdropping: A Compilation of Federal and State Statutes With Annotations and Bibliographic References" (1966).

Katz v. United States, 389 U. S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967), the rule of that case rendering all electronic eavesdropping upon private conversations within the reach of the search and seizure provisions of the Fourth Amendment would have no application. See **Deist v. United States**, ... U.S. ..., 22 L. Ed. 2d 248, 89 S. Ct. ... (1969); **Kaiser v. New York**, ... U.S. ..., 22 L. Ed. 2d 274, 89 S. Ct. ... (1969). See also **Giordano v. United States**, ... U.S. ..., 22 L. Ed. 2d 297, 89 S. Ct. ... (1969). Rather, the legality or illegality of any surveillance here brought to light must be judged by the pre-**Katz** rule of trespass or physical intrusion. See **Olmstead v. United States**, 277 U. S. 438, 72 L. Ed. 944, 48 S. Ct. 564; **Goldman v. United States**, 316 U. S. 129, 86 L. Ed. 1322, 62 S. Ct. 993. Accordingly, only such electronic surveillance as may be shown to have been conducted by means of a trespass or a physical intrusion by government agents could be found to be within the Fourth Amendment limitations.

A further guideline was established in **Alderman** wherein the Court held that any accused would be entitled to suppression of government evidence originating in electronic surveillance violating his own Fourth Amendment rights to be free of unreasonable searches and seizures and "such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations." Thus, the Court will here be concerned both with the overhearings of any defendant and with overhearings upon the premises of any defendant, even though the defendant did not participate in the conversations and even though he was absent at the time.

Additional guidelines laid down in **Alderman** relate to the standing of any particular defendant to object to evi-

dence obtained by electronic surveillance. Not every defendant is entitled to object, even though surveillance evidence may have been obtained by the Government in violation of a co-defendant's Fourth Amendment rights. The rule in this regard is stated thus in **Alderman**:

> "The established principal is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and co-defendants have been accorded no special standing . . .
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> * * * * * * * *
>
> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else . . .
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> ". . . We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."

Once an electronic surveillance which was obtained in violation of a defendant's Fourth Amendment rights has been identified as being available to or in possession of the Government, the issue then arises as to the procedure to be followed in determining its relevance to a defendant's conviction. **Alderman** establishes the rule that in such cases relevance is to be determined not by the Government, nor by an in camera inspection by the Court, but rather by making disclosure of the overhearings to the particular defendant whose rights are involved. As stated by the Court in **Alderman**, ". . . We can conclude that

surveillance records as to which any petitioner has standing to object should be turned over to him without being screened in camera by the trial judge." After pointing out that a defendant would have the burden of going forward with specific evidence that his conviction was tainted by the illegal overhearing, the Court concluded:

> "With this task ahead of him, and if the hearings are to be more than a formality and the petitioners not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the Government was not entitled to use in building its case against them."

As regards the procedure to be followed in identifying electronically surveilled materials within the possession of the Government and in making disclosure thereof, the Court gives the following practical advice in Alderman:

> "None of this means that any petitioner would have an unlimited license to rummage in the files of the Department of Justice. Armed with specific records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense and fairness of the trial judge."

Finally, should the Government be found to have possessed information at or prior to the time of the trial which was obtained by electronic surveillance conducted in violation of a defendant's Fourth Amendment rights, the ultimate question facing the Court in a proceeding of this nature is to determine whether or not the defendant's conviction was tainted by the use of the illegally obtained evidence. In making this determination the defendant will have the burden of going forward with specific evidence

demonstrating taint, but the ultimate burden of persuasion rests upon the Governmen . The rule in this regard is stated in Alderman as follows:

> "The United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint."

In accordance with the order of remand in the **Giordano** case and the guidelines established in the **Alderman** case, a hearing was held in this case in which numerous witnesses were examined and cross-examined by the parties and voluminous records were introduced. As instructed in **Alderman**, the Court must now proceed to make its findings and conclusions with respect to each defendant upon the following matters: (1) the question of whether with respect to any defendant there was electronic surveillance which violated his Fourth Amendment rights and (2) if there was such surveillance with respect to any defendant, whether any conversations so overheard bear any relevance to his conviction.

As initially filed, the defendants' fourth motion for a new trial made extensive and specific charges of illegal surveillance having been conducted by the Government both prior to and during the trial wherein the defendants were convicted. Numerous affidavits were filed in support of these charges. The Government, in their response, made specific denial of each allegation of surveillance in the defendants' motion, and supported their denials with a number of affidavits. As noted in the decision of this Court in overruling the defendants' fourth motion for new trial, **United States v. Hoffa**, 268 F. Supp. 732 (1967), the defendants defaulted in producing any evidence upon the initial evidentiary hearing upon their motion. Likewise,

it should be noted that at the evidentiary hearing upon the present remand of the case, the defendants offered no evidence in support of any of the initial allegations in their motion. Rather, the hearing was directed exclusively to the disclosures made by the Government before the Supreme Court in regard to electronic surveillance of two of the defendants, and toward the surveillance of a third defendant as developed in the course of the evidentiary hearing.

As noted above, the Government made a disclosure before the Supreme Court that it had in its possession electronic overhearings of two of the defendants, but no disclosure was there made as to the identity of the two thus referred to. Upon the evidentiary hearing it developed that the two defendants so referred to by the Government were the defendants Hoffa and Campbell. In the course of the evidentiary hearing it was disclosed for the first time that the Government also had in its possession a recording of a conversation between the defendant King and one Grady Partin, one of the principal witnesses to testify for the Government on the trial of the case. As noted above, King made no appeal from the decision of this Court overruling the fourth motion for new trial and he accordingly was not before the Supreme Court at the time of the remand on that motion, but he did seek and was permitted to participate in the evidentiary hearing to the extent that any of his rights may be involved on this state of the record.

The evidentiary hearing upon this remand extended over a period of six trial days. In the course of the hearing, 33 witnesses were examined and cross-examined and voluminous records were filed. The witnesses included the principal government officials in charge of the prosecution of this case, numerous agents and officials of the Federal Bureau of Investigation, officials of the Internal Revenue Service and other witnesses. The exhibits include the

records of all electronically monitored conversations referred to in the hearing, excerpts from grand jury minutes, and many normally confidential government files and records.

As a result of the hearing, it has been disclosed that the Government had in its possession during or prior to the trial of this case the following records obtained by electronic surveillance: (1) reports of telephone and radio telephone conversations in which the defendant Hoffa may have participated (Exhibits 5 and 7) (of these seven conversations four were obtained in the course of electronic surveillance conducted in Las Vegas, Nevada, and three were obtained in the course of electronic surveillance conducted in Detroit, Michigan); (2) reports of a number of radio telephone conversations in which the defendant Campbell may have participated (Exhibits 6 and 13) (all of these were obtained in the course of electronic surveillance conducted in Detroit, Michigan); and (3) a report of an electronically taped conversation between the defendant King and one Grady Partain, a witness who testified on the trial for the Government. Other than the above three matters, it appears that the Government has no other reports or records of any kind involving electronic surveillance of any party defendant. The evidence reflects that there was no electronic surveillance or overhearings of any kind of the defendant Parks (nor of the co-defendants Tweel and Dorfman, who were acquitted upon the trial). The evidence likewise reflects that no premises of any defendant was ever the subject of electronic surveillance except with respect to one radio telephone conversation of the defendant Hoffa, as hereinafter noted.

Hoffa Overhearings

Turning the Court's attention to the overhearings involving the defendant Hoffa, the record discloses that the Government has in its possession the logs of seven con-

versations obtained by electronic surveillance in which the defendant Hoffa may have been a party. The record of each conversation was made available unto the defendant in the Government's disclosure prior to the hearing and copies of the conversations were filed as exhibits at the hearing (Exhibits 5 and 7). Four of these conversations were obtained in the course of electronic surveillance conducted by the Federal Bureau of Investigation at the executive Offices of two casinos in Las Vegas, Nevada. Three of the conversations were obtained in the course of Federal Bureau of Investigation monitoring of radio telephone conversations in Detroit, Michigan.

With regard to the Las Vegas conversations, the evidence reflects that in May of 1962 an F. B. I. agent installed a hidden microphone in the Executive Office of one Major Riddle at the Dunes Hotel in Las Vegas and in the Executive Office of one Moe Dalitz at the Desert Inn Motel in Las Vegas, these installations being made in the course of investigations directed at the aforesaid individuals and establishments. These microphones were installed under the desks in the said offices and permitted the monitoring of conversations occurring in the rooms where they were installed. The installations were made secretly by the F. B. I. and were therefore made in the course of a trespass. However, there was no tapping of any telephone lines, and, as regards telephone conversations, only the voice of the person in the room could be monitored and not that of the person on the other end of the telephone line. The F. B. I. monitored conversations over these two microphones from May 18, 1962, until August 15, 1963. Upon two occasions, Major Riddle spoke over the telephone with someone he identified as Hoffa. These conversations related to borrowing money to purchase an insurance company. A third conversation was a call from Hoffa making a reservation of rooms for Mr. Schiffer. The fourth conversation was a call from Moe

Dalitz to "Jimmy", believed to be Jimmy Hoffa, and related to an insurance company matter.

With regard to the Las Vegas logs, it would appear clear that there was no Fourth Amendment right of the defendant Hoffa violated by the Government. While the surveillance was accomplished by means of trespass, no trespass was committed on the defendant's premises and no conversation of the defendant was ever overheard. See **Wong Sun v. United States**, 371 U.S. 471, 3 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Moreover, there was nothing in the conversation having the remotest relationship to any person or any issue on trial in this case. The government prosecutors were not aware of the conversations at the time of the trial and the trial could not have been tainted by the surveillance.

With regard to the three Detroit conversations involving the defendant Hoffa and disclosed to have been overheard by the Government, the evidence reflects that from July 31, 1961, to March 30, 1965, the F. B. I. monitored radio telephone conversations in Detroit in connection with an investigation directed toward the Teamsters Union in that city. It appears that the Teamsters Union had one or more mobile telephone units installed in automobiles used by union officials in the Detroit area. These units were tied into the telephone system by FM radio communication. Conversations to and from these mobile telephone units were monitored by the F. B. I. by means of a commercial type FM receiver installed at the F. B. I. offices in that city. A record or log of these conversations was kept. The Government disclosed that three conversations so monitored appeared to involve the defendant Hoffa as a party to the conversations. The full logs for the four-year period were read by the Court to verify that the three conversations disclosed were the only ones that appeared to involve the defendant Hoffa (Exhibit 8). These three conversations disclosed no matters of any con-

sequence to this litigation, but rather, to the extent that they are comprehensible, appear to deal with wholly unrelated personal or union business.

It is accordingly likewise clear with regard to the Detroit overhearings that there was no Fourth Amendment right of the defendant Hoffa violated by the Government. There was no trespass committed by the Government in monitoring radio communications. The premises of the defendant was never the subject of monitoring except to the extent that one of the radio communications monitored involved a conversation from a mobile telephone to the defendant Hoffa while at his home. And finally, not only is there no relationship between any matters involved in the conversations and any matters in issue in this lawsuit, but it also affirmatively appears that the trial in this case was not in any way tainted by the matters overheard. The Court is accordingly of the opinion that the record on this hearing clearly establishes that the Government conducted no unlawful surveillance of the defendant Hoffa and that no Fourth Amendment right of the said defendant was violated.

Campbell Overhearings

As regards the defendant Campbell, the record reflects that the Government disclosed prior to the hearings that it had in its possession some 254 conversations in which Campbell appeared to be a party. The record of each such conversation was made available to the defendant before the hearing. Each of the conversations thus disclosed was overheard in the course of the monitoring of radio telephone communications in the Detroit Office of the Federal Bureau of Investigation. This was in the course of the same monitoring of FM radio communications discussed above by the Court in connection with the three conversations of the defendant Hoffa. As previously stated, the

Court read the logs of all conversations monitored over a four-year period in order to verify that all conversations in which any defendant may have participated were disclosed (Exhibit 8). In the course of this search of the record, the Court found four additional conversations in which it appeared that the defendant Campbell may have been a party to the conversation. The logs of these additional conversations were likewise disclosed unto the defendant. None of the conversations involving the defendant Campbell so monitored by the Government bears any relevance to this case. Rather, they deal with local union business or matters personal to the defendant. There is a total absence of any showing that any matter so overheard by the Government played any part in the trial of this case or in any manner tainted the evidence used in the conviction of any defendant herein. On the contrary, it affirmatively appears from the record on this hearing that the Government conducted no unlawful surveillance of the defendant Campbell and that no Fourth Amendment right of the said defendant was violated.

King Overhearings

Turning to the only remaining overhearing, that of the electronically taped conversation between the defendant King and the witness Partain, the existence of this tape was first disclosed in the course of the present hearing. As for the origin of this tape and the circumstances of its having been recorded, the record reflects that during the course of the Government's investigation in preparation for presenting criminal charges against the defendants, one Grady Partain, an associate of the defendant Hoffa and a local Teamsters official, had been cooperating with the Government in furnishing information against the defendants. As a part of this cooperation, Partain agreed to have a tape recorder installed in his automobile by government agents in anticipation of recording a conversation

between himself and King. For this purpose, Partain made his automobile available to agents of the Federal Bureau of Investigation in Birmingham, Alabama, on May 7, 1963, and they installed a tape recorder in the automobile on that date. Partain then proceeded to Nashville, Tennessee, and had a conversation with King while in the automobile on May 8, 1963. With the recorder operating, the two men rode about Nashville and engaged in conversation for some 90 minutes. During a portion of this time they were out of the automobile while new tires were being installed. After letting King out of the automobile, Partain made the automobile available to F. B. I. agents in Nashville for removal of the tape and he then returned his automobile to Birmingham where the wiring was removed on May 10, 1963. An F. B. I. agent at Nashville attempted to transcribe the tape. Because of the overriding background noise and the extremely poor quality of the tape, he was able to decipher only rather limited portions of the conversation. His transcript of this was made available to the United States Attorney, who read it and then, according to his testimony, discarded it as being valueless. This transcript was filed in the record on the present hearing and made available to the defendants (Exhibits 1 and 12). Although it was testified that the original tape had been erased and reused, some time after the trial of this case, the Government had kept two copies of the tape and these were introduced into evidence (Exhibits 2 and 4). One of the tapes was then made available unto the defendants (Exhibit 4) and the defendant King audited the tape and made a transcript of his version of the contents.

The defendant's transcript of the recording is substantially the same as that made by the Government, with the defendant having managed to decipher some limited additional portions of the recording. The only portions of the recording which are decipherable and which appear

to relate in any way to this case are those portions of the tape wherein the defendant King and the witness Partin speculate about possible witnesses, speculate as to whether any indictment will be returned and, if so, who may be indicted and engage in further conversation regarding an occasion when King, along with an associate, Oscar Pitts, talked with a highway patrolman whose wife was serving on a jury trying the defendant Hoffa at the time.

With regard to the defendant King, it should first be noted that, technically speaking, he would have no standing before the Court in these proceedings as his conviction has been affirmed on appeal, he has served his sentence, and he has no motion or petition pending before this Court. As to him the judgment of this Court denying the fourth motion for new trial became final when no appeal was taken from it by him. Not being before the Supreme Court at the time of the remand, the case was not remanded as to the defendant King. The time for filing any further motions for new trial in this case has now long since expired (Rule 33, **Federal Rules of Criminal Procedure**). Accordingly, the only manner in which the defendant King could now have standing to assert matters before the Court would be by way of a petition for habeas corpus or a petition filed pursuant to § 2255, Title 28, U. S. C. Under such a petition he could assert only alleged errors of a constitutional or jurisdictional nature. Accordingly, to the extent that the defendant King might assert the matters now being complained of by a petition for habeas corpus or by a petition filed pursuant to § 2255, Title 28, U. S. C., the Court will consider the same.

To the extent that the defendant King complains of a violation of his Fourth Amendment rights to be free from illegal searches and seizures, it is apparent that the recorded conversation between Partain and King constituted no such violation, and this for several reasons. In the

first place, it is apparent that the recording was made without any trespass or physical intrusion. Rather, the recording was a consensual recording made in the automobile of the witness Partain and with the full knowledge, cooperation and consent of Partain. Such a recording would not constitute a violation of King's Fourth Amendment rights. **Alderman v. United States**, 394 U. S. 165, 22 L. Ed. 2d 176, ... S. Ct. ... (1969); **On Lee v. United States**, 343 U. S. 747, 96 L. Ed. 1270, 72 S. Ct. 967 (1951); **Lopez v. United States**, 373 U. S. 427, 10 L. Ed. 462, 83 S. Ct. 1381 (1963); **Osborn v. United States**, 385 U. S. 323, 17 L. Ed. 2d 394, 87 S. Ct. 429 (1966), rehearing denied 386 U. S. 938, 17 L. Ed. 2d 813, 87 S. Ct. 951. Furthermore, it is apparent that the recording and the information therein was neither used in the trial nor did it in any way taint the evidence that was used. The statements made by King in the recording, to the extent that they can be deciphered and to the extent that they were therefore available unto the Government, would appear to have no value, either for purposes of incriminating or for purposes of exculpating the defendant. The recording, to the extent that it provided information, provides no information that was not already known to the Government as reflected by the record upon the trial. It is clear that the recording had nothing to do either with the indictment or the trial of any defendant, including the defendant King. The offenses for which the defendants were here convicted occurred during the course of a trial of the defendant Hoffa in the United States District Court at Nashville, Tennessee, often referred to as the "Test Fleet" trial, which trial occurred in October, November and December of 1962. The indictment in this case was returned upon May 9, 1963. The recording of the conversation between Partin and King was taken on May 8, 1963. Not only did Government witnesses testify that the recording was not used in any manner in gathering or presenting evidence to the grand jury or at any other stage of the trial, but the

Court examined the minutes of the grand jury on the dates of May 8 and May 9, 1963, and verified the fact that there was no matter presented to the grand jury in any way related to the recording. Likewise, in verification that the recording was neither used itself, nor did it lead to any evidence used upon the trial, the record upon the trial reveals that the Government already had available to it before the date of the King-Partin recording, all of the evidence used by it on the trial regarding King, including the testimony of the F. B. I. agents who had observed King in November of 1962 at the time he engaged in the conversation with the highway patrolman, Paschal, the testimony of Oscar Pitts, who was with King at the time of the conversation with Paschal, the testimony of Paschal himself regarding the conversation with King, and the testimony of Partin, who reported on the King-Paschal conversation at or about the time in November 1962 when it occurred.

Having concluded that neither of the records in the possession of the Government obtained by electronic surveillance of the three defendants, Hoffa, Campbell and King, were obtained in violation of any defendant's rights under the Fourth Amendment, nor did they in any way taint the evidence used in the trial of any defendant, the Court has now determined all issues upon which the case was remanded by the Supreme Court. However, in the course of the hearing the parties have raised new and additional matters regarding the recording of the conversation between the defendant King and the witness Partin.

In the first place, it is contended that the King-Partin recording violated the defendant King's Fifth Amendment right not to be compelled to testify against himself and his Sixth Amendment right to be represented by counsel. It would appear clear that this contention is without merit. The case presents no matters that would fall within the rules announced in **Miranda v. State of Arizona,**

384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Not only did this trial occur prior to the **Miranda** case, and the rules announced in **Miranda** have been held not to be retroactive, **Johnson v. New Jersey**, 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966), but there was no custodial interrogation of the defendant King and there was no attempt by the Government to in any wise use the conversation. This Court's above finding that the recording did not in any wise taint the evidence used by the Government upon the trial would be equally as applicable to the defendant's Fifth and Sixth Amendment contentions as it would to his Fourth Amendment contention.

While under the particular circumstances of this case and under the reasoning announced in **Massiah v. United States**, 377 U. S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964), in the unlikely event that the reasoning of that case were held to be retroactive, it does appear that the taping of the recording may have violated the Fifth Amendment right of the defendant King to refrain from giving evidence against himself in that previous to the recording King had been called before the grand jury and had asserted his Fifth Amendment right to refrain from testifying. However, there could be no error here involved in that the recording was not used by the Government, nor did it taint any evidence used by the Government.

It is next contended by all defendants that the Government's failure to disclose the King-Partin recording at the time of the trial denied each defendant the use of the recording in cross-examining the witness Partin, all in violation of each defendant's rights under the Jencks Act, Section 3500, Title 18, U. S. C. This contention is without merit for several reasons. In the first place, neither defendant would have any standing to first assert a matter of this nature at this time. As noted above with respect to the defendant King, the time for filing further motions

for new trial has long since expired with respect to each defendant in the case. Rule 33, Federal Rules of Criminal Procedure. The present Jencks Act contention was not asserted by any defendant in his fourth motion for new trial. Rather, it is now being asserted for the first time by any defendant. At this time, and with regard to new matters, the defendants would at most be entitled to assert only such matters as could be asserted in a habeas corpus petition or a petition filed pursuant to § 2255, Title 28, U. S. C. That is, he could assert only errors of a constitutional or jurisdictional nature. After a defendant has been convicted, his conviction affirmed on appeal, and after the time for filing further motions for a new trial has expired, he may assert only allegations of error that rise to the level of constitutional errors or jurisdictional errors. Problems regarding Jencks Act statements are certainly not of a jurisdictional nature. Neither are they of a constitutional nature. Rather, they are of a statutory nature. **Jencks v. United States** (1956), 353 U. S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007; **Palermo v. United States** (1959), 360 U. S. 343, 3 L. Ed. 2d 1287, 79 S. Ct. 1217. Such problems are not subject to be raised on a habeas corpus petition or a petition filed pursuant to § 2255, Title 28, U. S. C. **United States v. Augenblick** (1969), . . . U. S. . . ., 2 L. Ed. 2d 537, 89 S. Ct. . . .; **Black v. United States** (C. A. 9, 1959), 269 F. 2d 38, cert. denied 361 U. S. 938, 4 L. Ed. 2d 357, 80 S. Ct. 379; **United States v. Gandia** (C. A. 2, 1958), 255 F. 2d 454.

In the second place, the King-Partin recording would not have constituted a statement subject to production under the Jencks Act. That Act refers to statements "made by a government witness or prospective government witness (other than the defendant) **to an agent of the government**" (emphasis supplied) as being subject to production under its terms. The recorded conversation between King and Partin is not a statement "made to an agent of

the government" and accordingly it would not be subject to production under § 3500, Title 28, U. S. C. **United States v. Sopher** (C. A. 7, 1966), 362 F. 2d 523, cert. denied 385 U. S. 928, 7 L. Ed. 210, ... S. Ct. .... King was not a witness for the Government and Partin, in talking with him, was not talking with an agent of the Government.

Finally, in view of the limited value of any information contained in the recording, the extensive cross-examination of the witness Partin by counsel for each defendant, such cross-examination extending over one full week of the trial and taking up 1300 pages in the record (Tr. pp. 3460-4731), including extensive cross-examination in regard to all matters in any way touched upon in the recording, and in view of the entire record upon the trial, the Court is of the opinion that the non-disclosure of the recording at the time of the trial was at the very most harmless error beyond a reasonable doubt. **Chapman v. California** (1967), 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824; **Harrington v. California** (1969), 395 U. S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726.

The foregoing statement as to the harmless nature of any alleged error involved in the non-disclosure of the King-Partin recording would be equally applicable and likewise decisive of all remaining contentions of the defendants, including the defendants' contention that the non-disclosure of each of the overhearings now disclosed would constitute a violation of the principles enunciated in **Brady v. Maryland** (1963), 373 U. S. 83, 101 L. Ed. 215, 83 S. Ct. 1194. The Hoffa and Campbell overhearings are so clearly unrelated to anything pertinent to this case as to be devoid of any possible relevance. While portions of the King-Partin recording do relate to the case, they are neither of an incriminating nor an exculpating nature. The recording, if used in the trial, would at the very most have been of a purely cumulative nature. Nothing was said in the recording of the slightest relevance to the trial

that was not testified to by witnesses in the trial, including both Partin and King. The only other possible use of the recording would have been for the cross-examination of the witness Partin. The extremely extensive cross-examination of this witness on all matters, including all matters touched upon in the recording, renders any possible error in the non-disclosure of the recording harmless beyond a reasonable doubt. This conclusion is further required by the extensive and overwhelming nature of the evidence of each defendant's guilt when the record is viewed as a whole.

The Court having concluded that no violation of any defendant's rights has been shown under the direction given by the United States Supreme Court in **Giordano v. United States**, ... U. S. ..., 22 L. Ed. 2d 297, 89 S. Ct. ... (1969), or in **Alderman v. United States**, ... U. S. ..., 22 L. Ed. 2d 176, 89 S. Ct. ... (1969), or related cases, and that no error has been shown to exist in the non-disclosure of the matters now disclosed by the Government that would constitute any ground for setting aside the conviction or granting a new trial as to any defendant, all pending motions are overruled and the conviction and sentence heretofore imposed upon each defendant, is affirmed.

An order will enter accordingly.

FRANK W. WILSON
United States District Judge

Order

(Filed: 1/8/70)

This case is before the Court upon the fourth motion for new trial filed on behalf of each defendant, the said motion having heretofore been denied [**United States v.**

Hoffa, et al., 268 F. Supp. 732 (1967)], the denial having been affirmed on appeal [**United States v. Hoffa, et al.**, 398 F. 2d 891 (1968)], certiorari having been granted and the case having been remanded by the United States Supreme Court with instructions that this Court conduct further proceedings regarding electronic surveillance of the defendants by the Government, disclosure of which was first made in the United States Supreme Court [**Giordano v. United States**, ... U. S. ..., 22 L. Ed. 2d 297, 89 S. Ct. ... (1969)]. This Court, having conducted further hearings in accordance with the instructions upon remand, is now of the opinion that all motions on behalf of each defendant, James R. Hoffa, Thomas Ewing Parks, Larry Campbell and Ewing King, should be denied and the conviction and sentence heretofore imposed upon each defendant should be affirmed, all for the reasons set forth in an opinion filed by the Court herein.

It is accordingly Ordered that any and all motions for new trial now pending herein on behalf of each defendant, James R. Hoffa, Thomas Ewing Parks, Larry Campbell and Ewing King, be and the same are hereby denied. The conviction of each defendant is affirmed and the sentence heretofore imposed upon each defendant will stand as the sentence of the Court herein.

Enter:

FRANK W. WILSON
United States District Judge

APPENDIX C

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

vs.

James R. Hoffa, Thomas Ewing Parks and Larry Campbell,
Defendants-Appellants.

No. 20,271

Before: Peck, McCree and Brooks, Circuit Judges

Judgment

(Filed Jan. 21, 1971)

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS
Clerk

A True Copy. Attest:

.....

CARL W. REUSS
Clerk

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United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

vs.

Ewing King,
Defendant-Appellant.

No. 20,272

Before: Peck, McCree and Brooks, Circuit Judges

Judgment

(Filed Jan. 21, 1971)

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1491

JAMES R. HOFFA, THOMAS EWING PARKS, EWING KING, AND LARRY CAMPBELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1964, petitioners were convicted in the Eastern District of Tennessee of jury tampering in connection with a 1962 criminal prosecution of petitioner Hoffa in the Middle District of Tennessee.[1] Their convictions, and the denial of their motions for a new trial, were affirmed on appeal. 349 F. 2d 20 (C.A. 6), affirmed 385 U.S. 293. Subsequent motions for a new trial, based on assertions of newly discovered evidence, were denied, and the denials were affirmed on appeal.

[1] Petitioners were sentenced to various terms of imprisonment; all except petitioner Hoffa have served their sentences and been released.

422-854—71

Petitioners contend that the recording constituted a Fourth, Fifth and Sixth Amendment violation—a contention which at all events is open only to petitioner King. See *Alderman* v. *United States, supra,* 394 U.S. at 171–176, 184; *Giordano* v. *United States, supra,* 394 U.S. at 312 fn. And even as to King, this Court's recent decision in *United States* v. *White,* No. 13, O.T. 1970, decided April 5, 1971, is dispositive, both on the ground that a recording of a conversation made with the consent of one of the participants is constitutionally permissible (slip op. at 3–8), and on the ground that *Katz* v. *United States,* 389 U.S. 347, is not retroactive (slip op. at 9).[5] Moreover, the record shows, and the district court found, that the government made no use of the questioned recording.

2. Petitioners also urge that non-disclosure of the recording during trial constituted a violation of the principle of *Brady* v. *Maryland,* 373 U.S. 83, and of the Jencks Act, 18 U.S.C. 3500. The short answer to the *Brady* contention (which is also available only to King) is that the recording, as the district court found (Pet. App. A39), was not exculpatory. As to the section 3500 argument, the recording was not a "state-

[5] Mr. Justice Brennan joined in the judgment on the retroactivity ground. Mr. Justice Harlan dissented on the retroactivity ground because the case "had not yet run [its] course on direct review" (slip opinion, Harlan, J., dissenting, at 25). In this case, direct review was concluded on December 12, 1966.

ment or report * * * made by a Government witness * * * to an agent of the Government * * *." Compare *United States* v. *Sopher,* 362 F. 2d 523, 525–526 (C.A. 7), certiorari denied, 385 U.S. 928.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

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IN THE

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OCTOBER TERM, 1970

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JAMES R. HOFFA, THOMAS EWING PARKS, EWING KING and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CASES CITED

	Page
Alderman v. United States, 394 U.S. 165	2
Brady v. Maryland, 373 U.S. 83	3
Giordano v. United States, 394 U.S. 310	2
Hoffa v. United States, 385 U.S. 293	2
Kinser v. Cooper, 6 Cir., 413 F. 2d 730 (1969)	3
Massiah v. United States, 377 U.S. 201	2
Spano v. New York, 360 U.S. 315	2

IN THE

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Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY

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1. The Solicitor General contends (Opp. 4)[1] that **United States v. White**, No. 13 Oct. Term, 1970 (April 5, 1971), is dispositive of Petitioners' contention that King's

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[1] "Opp." references are to the Memorandum for the United States in Opposition filed in this Court.

Fourth, Fifth and Sixth Amendment rights were violated. Petitioners' contentions however are grounded in the teachings set forth by this Court in **Spano v. New York**, 360 U.S. 315, and **Massiah v. United States**, 377 U.S. 201. Contrary to the facts in **White**, but rather like **Massiah**, at the time of the secret interview of King, the government's investigation had passed from the investigatory to the accusatory stage. For the clear purpose of the government's secret interrogation of King after indictment was complete, save for the formality of its return in open court, was not investigatory in nature, but rather sought to uncover defense strategy and plans. Such matters are peculiarly within the protection of the Sixth Amendment.[2] Thus, the brief in opposition does not address itself to Petitioners' prime contention.[3]

The failure of the Solicitor General to perceive the Sixth Amendment's protection and underpinning of Petitioners' contentions is also demonstrated by its argument that the contention "[i]s open only to Petitioner King . . ." The Fourth Amendment cases (**Alderman v. United States**, 394 U.S. 165, 171-176, 184; **Giordano v. United States**, 394 U.S. 310, 312) are not analogous. The "standing" question of a co-defendant in respect to a Fourth Amendment intrusion is essentially dissimilar

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[2] The Solicitor General apparently abandons the Court of Appeals holding that **Hoffa v. United States**, 385 U.S. 293, 309 is apposite (cf. Pet. App. A. 6). In **Hoffa**, this Court's ruling was based on the fact that what was involved was the investigation of an on-going crime. **White**, *supra*, plainly falls within the same frame of reference. Here the alleged crime took place months prior to the time of the interrogation.

[3] The Argument ". . .[t]he government made no use of the questioned recording" (Opp. 4) likewise turns on the interpretation that the King interview sought evidence rather than insight into the defense camp's strategy. In fact, the prosecutor "used" the recording for the purpose for which it was obtained —to discover how strong the defense was (Pet. 11, 17).

from a Sixth Amendment intrusion upon the defense. Defense strategy and planning is commonly, even likely, a joint enterprise among defendants. When a joint indictment is drawn and the government chooses to try defendants jointly, cooperation among those charged becomes an absolute necessity. Intrusion into the common defense is thus patently intrusion on all.

Moreover, since reversal of King's conviction is required, petitioner Hoffa's conviction (as an aider and abettor) must be reversed, since Hoffa could not be convicted unless King was properly convicted (Pet. 20, **Kinser v. Cooper**, 6 Cir., 413 F. 2d 730 (1969)).

2. The Solicitor General limits **Brady v. Maryland**, 373 U.S. 83, claiming that "the short answer to the **Brady** contention is that the recording, as the district court found, was not exculpatory" (Opp. 4-5). **Brady**, however is not so restrictive. It holds that suppression of "evidence favorable to an accused" violates the due process clause. Evidence which on cross-examination of the key witness against a criminal defendant would directly or inferentially impeach his testimony of alleged admissions made by the defendant, certainly should not be held to be outside the **Brady** rule. Grant of certiorari is necessary here in the light of the Solicitor General's argument to clarify the meaning and extent of **Brady**.[4] Denial of certiorari here would apparently endorse the government's argument, which would continue the policy in this re-

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[4] The Solicitor General also seeks to limit the **Brady** contention claiming it "is also available only to King." Plainly, Hoffa at the very least would have standing to complain on the purposeful suppression by the prosecution of evidence tending to show Partin lied when he testified that Hoffa admitted guilt to him. And even if King were not indicted, Hoffa would be entitled to evidence which demonstrated that Partin's testimony, that the alleged principals had committed the crime of which Hoffa was charged as an aider and abetter, was untrue.

spect, apparently currently in vogue of prosecution suppression of such evidence.

Respectfully submitted

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